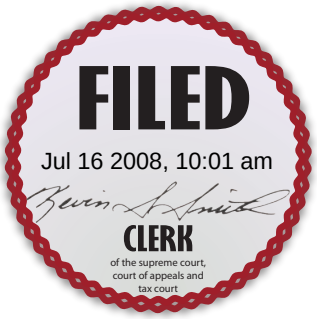

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IN THE
COURT OF APPEALS OF INDIANA

RAYMOND E. MYERS, JR.	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A05-0803-CR-154
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald C. Johnson, Judge
Cause No.79D01-0707-FD-29

July 16, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a guilty plea, Raymond Myers appeals his sentence of three years for possession of marijuana with a prior conviction, a Class D felony, enhanced by five years because of his habitual substance offender status, with one year suspended. Myers argues the trial court abused its discretion in sentencing him and that his sentence is inappropriate given the nature of the offense and his character. We conclude the trial court abused its discretion in failing to find Myers's guilty plea as a mitigating circumstance. We further conclude that Myers's sentence is inappropriate, and reduce his sentence to the advisory sentence of one-and-one-half years, enhanced by five years, for an aggregate sentence of six-and-one-half-years, with one year suspended.

Facts and Procedural History

On June 11, 2007, authorities were summoned to an apartment building in Lafayette, Indiana. Upon their arrival, officers found Myers and another man sleeping in a hallway. The officers determined that Myers was wanted on a warrant, and placed him in custody. While searching Myers, the officer discovered a small amount of marijuana. On June 12, 2007, the State charged Myers with possession of marijuana, a Class A misdemeanor, possession of marijuana while having a prior conviction, a Class D felony, and alleged that Myers was an habitual substance offender. On November 20, 2007, the day of his trial, Myers pled guilty to both charges and admitted that he was an habitual substance offender. This plea was not made pursuant to any agreement with the State. On January 29, 2008, the trial court held a sentencing hearing at which it found Myers's criminal history to be an aggravating circumstance and found no mitigating

circumstances. The trial court sentenced Myers to three years for possession of marijuana, enhanced by five years because of his status as an habitual substance offender. The trial court suspended one year, for an aggregate sentence of eight years with one year suspended to probation. Additionally, the trial court ordered that Myers execute four years in the Department of Correction and three years through Tippecanoe County Community Corrections. Myers now appeals.

Discussion and Decision

I. Propriety of Sentencing Order

A. Mitigating Circumstances

Myers argues the trial court improperly failed to find as mitigating circumstances his guilty plea, family support, and his level of services inventory (LSI-R) "score which indicated that he fell into the moderate needs category." Appellant's Brief at 8. A trial court may impose any legal sentence "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Ind. Code § 35-38-1-7.1(d). However, a trial court is still required to issue a sentencing statement when sentencing a defendant for a felony. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218. "If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating." Id. The trial court may abuse its discretion if it omits "reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law." Id. at 490-91.

Although Myers discussed his family support at the sentencing hearing, our review of the record does not convince us that the trial court abused its discretion in declining to find that this mitigating circumstance was significant. See Anglemyer, 868 N.E.2d at 490 (recognizing that the trial court is required to identify "significant mitigating and aggravating circumstances" (emphasis added)); cf. Kincaid v. State, 839 N.E.2d 1201, 1206 n.6 (Ind. Ct. App. 2005) (holding trial court did not abuse its discretion by declining to find defendant's family support to be significant mitigating circumstance). In regard to Myers's LSI-R score, "which indicates there is a 48.1% chance he will re-offend within one year if no services are provided," appellant's green appendix at 7, we fail to see how this circumstance is mitigating at all, let alone significantly so.

However, we conclude the trial court abused its discretion in failing to find Myers's guilty plea as a mitigating circumstance.[1] "[A] defendant who willingly enters a plea of guilty has extended a substantial benefit to the state and deserves to have a substantial benefit extended to him in return." Francis v. State, 817 N.E.2d 235, 237 (Ind. 2004) (quoting Scheckel v. State, 655 N.E.2d 506, 511 (Ind. 1995)). We recognize that a guilty plea is not always a significant mitigating circumstance. See Primmer v. State, 857 N.E.2d 11, 16 (Ind. Ct. App. 2006), trans. denied. Such is the case when the guilty plea "does not demonstrate the defendant's acceptance of responsibility . . . or when the defendant receives a substantial benefit in return for the plea." Angleymer, 875 N.E.2d at 221. A plea's significance may also be reduced if the plea is made on the eve of trial after the State has expended substantial resources, see Gillem v. State, 829 N.E.2d

[1] Although it does not appear that Myers argued at sentencing that his guilty plea should be considered a mitigating circumstance, he did not waive this argument. See Anglemyer v. State, 875 N.E.2d 218, 220 (Ind. 2007) (opinion on reh'g).

598, 605 (Ind. Ct. App. 2005), trans. denied, or if there is substantial admissible evidence of the defendant's guilt, see Primmer, 857 N.E.2d at 16.

Here, Myers did plead guilty on the eve of trial, and it appears that there may have been admissible evidence of his guilt, although the record is far from conclusive on this point. However, the State has not argued that it expended significant resources on Myers's case. Most importantly, Myers pled guilty without the benefit of a plea agreement and appears to have taken full responsibility for his actions. Under these circumstances, we conclude the trial court abused its discretion in failing to find his plea as a significant mitigating circumstance. See Creekmore v. State, 853 N.E.2d 523, 530 (Ind. Ct. App. 2006) (holding trial court abused its discretion in failing to find the defendant's guilty plea to be a mitigating circumstance where the plea was not made pursuant to an agreement and the defendant did not express "an expectation that any benefit would be extended to him"), clarified on reh'g on other grounds, 858 N.E.2d. 230.

When we find an error in the trial court's sentencing statement, "we have the option to remand to the trial court for a clarification or new sentencing determination, to affirm the sentence if the error is harmless, or to reweigh the proper aggravating and mitigating circumstances at the appellate level." Cotto v. State, 829 N.E.2d 520, 525 (Ind. 2005). We may also elect to review the sentence under Appellate Rule 7(B). See Windhorst v. State, 868 N.E.2d 504, 507 (Ind. 2007); Feeney v. State, 874 N.E.2d 382, 385 (Ind. Ct. App. 2007). We elect to follow this last option, and will review the appropriateness of Myers's sentence below.

B. Execution of Habitual Substance Offender Enhancement

At the sentencing hearing, the trial court asked, "Now here's the thing, on these enhancements, whatever I give him on the enhancement has to be executed, doesn't it?" Transcript at 23. Myers's counsel responded, "Actually it can be on Community Corrections. It just, it can't be suspended if the underlying offense is non-suspendable. However, any executed time you give him can be a direct commitment to Community Corrections." Id. Myers argues that the trial court "erroneously rel[ied] on the mistaken belief that any enhancement on the habitual substance offender count had to be executed." Appellant's Br. at 9. The State counters that the trial court was not permitted to suspend any portion of the five-year enhancement. We note that a split on this court has developed as to whether a trial court is permitted to suspend any portion of a habitual offender enhancement. Compare Reffett v. State, 844 N.E.2d 1072, 1074 (Ind. Ct. App. 2006) (holding a trial court may not suspend any portion of an habitual substance offender enhancement) with Bauer v. State, 875 N.E.2d 744, 749 (Ind. Ct. App. 2007) (holding that under certain circumstances, a trial court may suspend part of an habitual offender enhancement), trans. denied. These two cases adequately set out the opposing arguments, and we do not feel it necessary to discuss the issue at length.

As the trial court ordered that Myers execute more than the minimum non-suspendable portion of his sentence, we conclude that even if the trial court was permitted to suspend part of the habitual substance offender enhancement, it would not have done so. Therefore, any error is harmless in this case. Cf. Robertson v. State, 871 N.E.2d 280, 287 (Ind. 2007) (recognizing that appellate courts will not remand for

resentencing where the trial court used invalid aggravating circumstances "unless we can say with confidence that the trial court would have imposed the same sentence if it considered only the proper aggravators"); Merlington v. State, 814 N.E.2d 269, 273 (Ind. 2004) ("Where we find an irregularity in a trial court's sentencing decision, we have the option to . . . affirm the sentence if the error is harmless . . . ."). Additionally, at the sentencing hearing, Myers's counsel requested a sentence of six years with four years executed. Even under Bauer, the minimum executed sentence the trial court could have ordered Myers to execute was three-and-one-half years. See Bauer, 875 N.E.2d at 750 (recognizing that where the defendant was convicted of a Class D felony and adjudged to be an habitual substance offender, the trial court could have suspended any portion of the sentence in excess of the minimum sentence of three-and-one-half years). Again, given that Myers's counsel requested a sentence with an executed portion above the minimum and the trial court ordered a longer executed portion, we fail to see how any error could be predicated on the trial court's belief as to its authority to suspend a portion of Myers's habitual offender enhancement.

C. Double Enhancements

Myers also argues that his conviction of possession of marijuana while having a previous conviction and the imposition of the habitual substance offender enhancement constitutes an impermissible double enhancement. Initially, we note that Myers pled guilty to possession of marijuana while having a previous conviction and to being an habitual substance offender. Myers has therefore waived his argument that any double enhancement was improper. See Collins v. State, 817 N.E.2d 230, 231 (Ind. 2004) ("A

person who pleads guilty is not permitted to challenge the propriety of that conviction on direct appeal."); Tumulty v. State, 666 N.E.2d 394, 396 (Ind. 1996) (holding the defendant was not entitled to pursue on direct appeal the trial court's acceptance of his guilty plea to three charges, including being an habitual offender).

Waiver aside, there was no improper double enhancement in this case. Our supreme court has held that the same conviction may be used to enhance a charge of possession of marijuana from a Class A misdemeanor to a Class D felony and to impose an habitual substance offender enhancement. State v. Downey, 770 N.E.2d 794, 798 (Ind. 2002). Further, in order to be adjudged an habitual substance offender, the defendant must have accumulated two prior unrelated substance offenses. Ind. Code § 35-50-2-10(e). Possession of marijuana is elevated to a Class D felony if the defendant has one prior conviction. Ind. Code § 35-48-4-11. Myers admitted to having three prior unrelated substance offenses. Therefore, the offense that was used to elevate the possession of marijuana charge was not necessary to establish Myers's status as an habitual substance offender. In sum, there was no error in the trial court sentencing Myers for possession of marijuana with a prior conviction and enhancing that sentence because of his status as an habitual substance offender.

II. Appropriateness of Sentence

A. Standard of Review

"Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution 'authorize independent appellate review and revision of a sentence imposed by the trial court.'"

Anglemyer, 868 N.E.2d at 491(quoting Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006)). When reviewing a sentence imposed by the trial court, we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). We have authority to "revise sentences when certain broad conditions are satisfied." Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005). When determining whether a sentence is inappropriate, we recognize that the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). We must examine both the nature of the offense and the defendant's character. See Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied. When conducting this inquiry, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied. The burden is on the defendant to demonstrate that his sentence is inappropriate. Childress, 848 N.E.2d at 1080.

B. Nature of the Offense and Character of the Offender

Here, the trial court sentenced Myers to an aggregate sentence of eight years, with one year suspended. The maximum sentence the trial court could have ordered was eleven years, and the minimum was three-and-one-half years. See Ind. Code §§ 35-50-2-7 (indicating the sentencing range for a Class D felony is six months to three years); 35-50-2-10(f) (indicating a trial court "shall sentence a person found to be a habitual

substance offender to an additional fixed term of at least three (3) years but not more than eight (8) years imprisonment").

Myers fell asleep in a hallway outside his friend's apartment, and police discovered a small amount of marijuana in his pocket after arresting him for an unrelated reason. It does not appear that anything about Myers's act of possessing marijuana renders his offense any more egregious than the typical offense.

In regard to Myers's character, we recognize that he has a fairly significant criminal history, consisting of Class C felony convictions of burglary and two counts of forgery; Class D felony convictions of two counts of possession of marijuana, maintaining a common nuisance, auto theft, and possession of a controlled substance. However, we also recognize that he pled guilty to the instant offense and received no benefit in return from the State. See Scheckel, 655 N.E.2d at 511 (recognizing that a guilty plea comments favorably on a defendant's character). Based on this plea and Myers's statements at the sentencing hearing, it appears that Myers has taken responsibility for his actions and is attempting to address his obvious substance abuse problem. We also note that Myers has a history of employment and was employed at the time of the instant offense. Cf. Miller v. State, 884 N.E.2d 922, 929 (Ind. Ct. App. 2008) (discussing the defendant's employment history in analyzing the defendant's character), reh'g pending. Also, Myers appears to have the support of his family and friends. Cf. Morgan v. State, 829 N.E.2d 12, 18 (Ind. 2005) (reducing sentence to the presumptive after concluding that mitigating circumstances, including defendant's family support, were in equipoise with the aggravating circumstances).

After reviewing the nature of the offense and Myers's character, we conclude the more appropriate sentence is the advisory sentence of one-and-one-half years for possession of marijuana, enhanced by five years because of his status as an habitual substance offender, with one year suspended to probation. We further order that Myers execute three years of this sentence in the Department of Correction, and two-and-one-half years through Tippecanoe County Community Corrections.

Conclusion

We conclude the trial court abused its discretion in failing to find Myers's guilty plea to be a mitigating circumstance. In all other respects, the trial court did not abuse its discretion in sentencing Myers. However, after reviewing the nature of the offense and Myers's character, we conclude his sentence was inappropriate, and revise Myers's sentence to six-and-one-half years, with one year suspended, to be served as described above.

Reversed.

BAKER, C.J., and RILEY, J., concur.